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*Before the
Federal Communications Commission
Washington DC 20554*

In the Matter of

Amendment of Section 73.202(b),
Table of Allotments,
FM Broadcast Stations.
(Berlin and North Conway, New Hampshire)

MM Docket No. 97-216
RM-9153

COMMENTS TO NOTICE OF PROPOSED RULE MAKING

1) Tyler P. Harwell ("Harwell") hereby submits the following comments in response to the above-referenced matter, in which Fuller-Jeffrey Broadcasting Corporation of Greater Des Moines ("petitioner") requests the reallocation of Channel 279C from Berlin to North Conway, New Hampshire. The petitioner operates station WPKQ-FM on this channel and seeks to specify North Conway as its community of license.

2) The petitioner has operated WPKQ-FM since October, 1996 and since that date has ignored the programming needs of both Berlin, the existing community of license, and of the entire service area of Channel 279C. The petitioner took a station that had previously served Berlin and the surrounding area with live, local programming 24 hours a day and turned it into a repeater for WOKQ-FM, which is also owned by the petitioner. WOKQ-FM is located in Dover, New Hampshire, approximately 100 miles south of Berlin. The petitioner rebroadcasts, or simulcasts, WOKQ-FM on Channel 279C and thus supplies programming unresponsive to the particular needs of Berlin and the rest of the service area. The petitioner cuts into their rebroadcast programming of WOKQ-FM occasionally, but only for local advertising from the service area of Channel 279C. All

announcers on WPKQ-FM (Channel 279C) are just those rebroadcast from WOKQ-FM, 100 miles from Berlin. The petitioner does not maintain an office in WPKQ-FM's community of license nor does it employ anyone there. It apparently does not even have a local address in Berlin.

3) The petitioner has misstated or twisted several key facts and has omitted other relevant information. North Conway is not a municipality but rather part of the township of Conway. Contrary to the petitioner's statement, North Conway does not have "its own...fire and police departments." Conway has one government and the fire and police departments are not controlled by the areas of the town they happened to be located in. A municipal fire station is located in North Conway but it serves all of the Town of Conway. The town police department is actually located closest to the Redstone area of Conway, not North Conway as stated by the petitioner. As with most fire and police stations, the location of these facilities in the Town of Conway is dictated by logistical considerations. The location of Conway's fire station does not confer any special status on North Conway any more than the police station's location in Redstone does on that area. The fact that there is a post office and separate zip code in North Conway only means that the Town of Conway is geographically large. There are several post offices scattered throughout the town. Furthermore, North Conway does not have "the area's only hospital" as stated by the petitioner. In fact, the largest hospital in the area is the Androscoggin Valley Hospital in Berlin, the city the petitioner wishes to abandon as its community of license.

4) Distinct communities and areas are given legal status for a reason. North Conway and the other so-called "communities" with the Town of Conway have purposely *not* been so designated by the municipal authorities. The petitioner now seeks to sub-divide the Town of Conway on their own. The petitioner's claim that North Conway deserves special recognition because it has "its own post office and zip code, the area's only hospital ... and fire and police departments" have been shown to be patently false or misleading. The petitioner's further claim that North Conway has "the majority of commercial and other establishments" and "several factory outlet malls" is equally misleading. North Conway is not a legally identifiable area and is merely the name given to the northern end of the Town of Conway. Many rural towns refer to their geographic areas thusly (East Conway and Center Conway are two obvious examples). Since there is no legal definition of what North Conway actually is, it is therefore impossible to say where "the majority of commercial and other establishments" are actually located, except to say that they are *all* in the Town of Conway. In reality, as any local

would know, most of the businesses in the Town of Conway are located on the "strip" in something of a no-man's land between North Conway, Redstone and Conway. There are no legal boundaries between these areas and the petitioner is now creating this self-serving illusion for their own purposes.

5) The Town of Conway has one high school that is located in what the petitioner would call the "community" of Conway. The "five distinct communities" within the town of Conway" claimed by the petitioner did not appear so distinct when their students all cheered Kennett High School on together in the final game of the State Football Championships this past fall.

6) Conway has three radio stations that serve the entire town (and all five of the petitioner's so-called "distinct communities," including North Conway) with "city grade coverage." For the petitioner to contend that the reallocation of Channel 279C to North Conway would provide that end of town with its first local service is simply false and misleading. The petitioner is attempting to create a self-serving division in a town that is legally unified. The three local radio stations already serving the Town of Conway would certainly disagree that the petitioner thinks they would provide "first service" to North Conway. These three stations are licensed to the *Town* of Conway, not to one of the "distinct communities" invented by the petitioner.

7) The petitioner has neglected to mention that it owns and operates WHOM-fm on 94.9mhz, a station that also covers the Town of Conway with city grade coverage. The petitioner's request to move WPKQ-FM's community of license out of Berlin to North Conway is just a thinly veiled attempt to consolidate their locations from a business standpoint and is contrary to good, local radio programming.

8) Berlin is the largest city in the northern half of the state and would be left with one *Class IV AM station* should the petitioner's request be granted. Despite the petitioner's transparent and self-serving attempt to claim first service to *North* Conway, the fact remains that they seek to locate a fourth service in the Town of Conway, which has just two-thirds the population of the City of Berlin. The petitioner shows the 1990 census population of the City of Berlin as 11,824. The petitioner neglects to state that the entire Town of Conway had a population of 7,940 according to the same census. Furthermore, Berlin is in the most remote area of the state and receives far fewer outside radio signals than available in the Town of Conway (or *North* Conway).

9) The petitioner has made erroneous statements to the Commission. The petitioner has not served its existing community of license with WPKQ-FM (Channel 279C) and has shown woeful ignorance of the "community" of North Conway that they now seek refuge in. Their proposed actions would do a grave injustice to the City of Berlin, which would lose its *only* FM service, while adding a *third* FM (and *fourth* overall) service to the Town of Conway. That North Conway may be listed as a Census Designated Place ("CDP") is irrelevant. According to the Census Bureau, CDPs are "not legally incorporated places." Furthermore, CDPs "have no legal status, nor do these places have officials elected to serve traditional municipal functions." It should be pointed out that Berlin itself has several "communities" analogous to those the petitioner are claiming in the Town of Conway. These areas in Berlin include Cates Hill, the East Side, Russian Village and Norwegian Village and Downtown. All of these communities are older than North Conway. Several of these communities have populations greater than the 2,032 people living in the CDP called North Conway. The Petitioner does not seek to designate any of these areas in Berlin as its new community of license.

10) The Commission's grant of the petitioner's request would set a bad precedent. It would encourage unresponsive broadcasters to ignore their communities of license to the point where citizens forget what service they are entitled to under Commission policy. Then, after deserting their community of license in a programming sense, such broadcasters can more easily skip town in a physical sense. This is the petitioner's *modus operandi*. Furthermore, this grant would encourage broadcasters to deluge the Commission with requests to change communities of license by inventing "distinct communities" that deserve "first service." The Commission would thus help licensees to stake out claims in various parts of their existing communities of license to keep other broadcasters (who may wish to provide a legitimate first service, such as with a newly allocated frequency) out. This could become especially endemic with the new ownership rules. This would be anti-competitive and a misuse of Commission resources. By allowing petitioners to sneak into self-serving areas that have no legal identification, such licensees could abandon the traditionally defined communities of license that are well-established in Commission Rules and in general law. This would lead to licensees gravitating to smaller parts of their existing communities of license under the banner of providing "first service." Meanwhile, the towns and cities that licensees had called home would be eroded by defections to various parts of their existing communities that have no legal status. This would be a perversion of Commission rules and policy.

11) Looking at the petitioner's statements, it simply cannot be determined if North Conway (however it is defined) has "the majority of commercial and other establishments" within the Town of Conway. Therefore, the petitioner's claim is specious. However, it is *very* clear that North Conway has the *minority* (about one-quarter) of the town's population. In short, the Commission should rely upon legally designated communities when allocating frequencies and when designating communities of license. This will avoid self-serving inventions such as the one being foisted on the Commission by the petitioner.

12) The Commission should not allow petitioners to shuffle communities of license around like a shell game. The naming of different geographical parts of the Town of Conway by the town authorities was not an effort to carve up their community into five little pieces. Should the Commission consider grants such as that requested by the petitioner, it should at least give existing licensees in each town and city in the United States the first opportunity to play musical chairs within their own communities. The intent of designating legitimate communities of license would be lost. For example, the three local stations in Conway would find no significance in being licensed to the Town of Conway. Broadcasters like the petitioner could cherry pick areas of their own choosing within this legitimate community of license of Conway. This gerrymandering would undermine the efforts of good, local broadcasters. For example, the existing radio stations in Conway would be penalized because they haven't spread their licenses around town into different willy-nilly little sub-communities.

13) It should be noted that the petitioner's transmitting facility is not located within the Town of Conway (the three local stations in Conway do, however, have their transmitting facilities and studios within the town limits). Furthermore, the petitioner has conspicuously avoided stating whether or not they would begin to operate and program WPKQ-FM (Channel 279C) from studios in North Conway should their request be granted. If they did so, it would be the responsive programming they denied to their existing community of license in Berlin. However, the petitioner has simulcast WPKQ-FM (Channel 279C) from a remote location for over a year now and appears merely only to be seeking a more fashionable and convenient local address in North Conway.

14) The petitioner should not now be rewarded by the Commission after ignoring the programming needs of Berlin, their City of License, and of their overall service area. Rather, the petitioner should be held accountable for their unresponsive

programming and for their misstatements as the Commission's first order of business.

For the above reasons, Tyler P. Harwell, requests that the above-referenced Notice of Proposed Rule Making be denied.

Respectfully submitted,

by:

A handwritten signature in black ink, appearing to read 'Tyler P. Harwell', written over a horizontal line.

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dated: December 1, 1997